UNITED STATES FIDELITY AND
GUARANTY CO.

vs.

DOHENY, ADMINISTRATRIX

BRIEF ON BEHALF OF PETITIONER

The summary statement of the matter involved covers most of the material facts in these cases.

In the complaint in the trial court the plaintiff alleged:

First: The execution of the highway contract between the State of Montana and Coverdale & Johnson. (R 4-27).

Second: In general terms but not in haec verba, plaintiff alleged that the highway contract required the contractor to furnish a performance bond (R 5-28).

Third: In general terms but not in haec verba, plaintiff alleged that the highway contract required the contractor to furnish public liability insurance to indemnify the public for injuries or damage sustained by reason of the carrying on the work (R 5-29).

Fourth: That the United States Fidelity and Guaranty Company notified the Highway Commission in writing that it had issued the contractor's public liability policy (R 6-29).

Fifth: Then follow the allegations of the automobile accident; the recovery of judgments in the state courts and the demand for and refusal of payments by the surety company. In the complaint none of the documents are pleaded except in general terms.

The defendant in the trial court filed a motion to dismiss and a motion to strike from each of the complaints (R 50-51-52).

The motions were denied (R 54).

In the answers (R 55 and R 59) the defendant, having admitted the documents referred to in the complaint alleged affirmatively that the public liability policy contained an exclusion under which the driving or using of any vehicle or automobile was excepted from the coverage provided in the policy (R 55 and R 59).

No reply was filed.

No estoppel was pleaded or relied on and no finding of estoppel was made by the trial court. Furthermore the trial court, after finding that the documents were executed as alleged in the complaint also found that "no information concerning its (the public liability policy) provisions was ever given to said State of Montana or said Highway Commission except" by the letter of October 1, 1934 (R 191), thereby finding that in effect no representation essential to estoppel was made to the state and certainly none upon which plaintiff, as a member of the public could rely.

The Circuit Court of Appeals concluded that the trial court had declined to give effect to the exclusion provision. It said:

> "It (the trial court) declined to give effect to the exclusion provision of the policy relating to the immediate place of injury, in effect holding appellant responsible as an insurer notwithstanding the exclusion." (Opinion of Circuit Court of Appeals.)

However, the Circuit Court of Appeals then went on to say:

> "Appellant is in the business of writing surety bonds and public liability policies, for which it charges a compensation. It has sought and obtained

from the state the right to carry on that business in Montana. It was fully advised of the broad requirement contained in the agreement, the performance of which it had guaranteed. We assume that, notwithstanding its performance bond, it was not itself obligated to write the required public liability policy, and we may assume further that if it did so it might incorporate therein such exclusions as it saw fit; but in the latter event a lively appreciation of its dual position, as well as a rudimentary sense of good faith, would have suggested that it seek a corresponding modification of the requirement or at least that it point out to the state the particulars in which its insurance contract fell short of the required coverage. See sec. 7528 R. C. Montana. Apellant did none of these things. On the contrary, its letter to the commission was calculated to induce that body to believe that a policy had been issued to the contractor as broad as that described in the specifications. There is not even a showing that the policy appellant wrote in this instance was a standard form in general use, or, more specifically, that policies written by concerns engaged in writing public liability insurance on behalf of contractors commonly contain exclusion clauses comparable with the one here. Under the circumstances appellant will not be heard to say that the policy it actually wrote was less comprehensive than the requirement, giving to the latter a fair and reasonable interpretation. To hold otherwise would virtually amount to the sanctioning or encouragement of frauds upon the state, and through the state upon its people and others within its borders. We are persuaded that the courts ought not lend their aid to such practices."

Thus, as indicated in Judge Haney's special opinion, invoking the doctrine of estoppel for the first time:

"Third. I do not believe this case is a proper one for the invocation of an equitable estoppel. My un-

derstanding of such an estoppel is the case where one, by his conduct has mislead another who relies on the fact indicated by such conduct, to his disadvantage. See 21 C. J. 1113, sec. 116. While an estoppel might arise here as against the state, appellee has relied on no conduct of appellant, and consequently has neither taken nor changed her position as a result of any action of conduct of appellant.

"I think the judgment should be affirmed but on the ground that recovery is had under the bond."

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in sustaining the judgment of the District Court.

2. The Circuit Court of Appeals erred in holding that the defendant could not be "heard to say that the policy it actually wrote was less comprehensive than the requirement" in the construction contract:

(a) Because in so holding, the Circuit Court of Appeals was invoking an estoppel which was never pleaded, relied on or proven, and was unavailable against defendant under Rule 8(c) and Rule 12(h) of the Rules of Civil Procedure for the District Courts of the United States.,

(b) Because no estoppel existed in these cases.

3. The Circuit Court of Appeals erred in holding that the exclusions in the public liability policy were inoperative.

4. The Circuit Court of Appeals erred in holding that measure of defendant's liability must be determined by the provisions in the construction contract and not by those in the liability policy.

JURISDICTION

It is submitted that under these circumstances the Supreme Court should take jurisdiction:

I.

Because Rule 8(c) and Rule 12(h) of the Rules of Civil Procedure for the District Courts of the United States provide that:

> "In pleading to a preceding pleading a party shall set forth affirmatively .... estoppel .... and any other matter constituting an avoidance or affirmative defense." Rule 8(c)

and

> "WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion, as hereinbefore provided or, if he has made no motion, in his answer or reply, ... " Rule 12(h).

These rules will be discussed later in this brief.

II.

This Court should take jurisdiction because the Supreme Court of Montana has held repeatedly that a party must plead estoppel to rely on it unless he has had no opportunity to plead it. The Montana cases are discussed hereafter.

III.

Wholly aside from the question of pleading, this Court should take jurisdiction because, as will be shown, similar contract provisions and contractor's public liability insurance are in effect in many, if not in most, of the public construction contracts throughout the United States, including the United States Bureau of Public Roads; the

United States Reclamation Service; the United States Public Works Administration; The Montana State Highway Commission (and probably most other State Highway Commissions); the Montana Water Conservation Board; some and probably many irrigation district commissions; school boards and other public contracting bodies.

As will be shown, it is in the interest of uniformity of decision and in the public interest to have this question decided by the court of last resort.

I. and II .

The above cited Rules of Civil Procedure for the District Courts of the United States are not out of harmony with the general law. It is the majority rule, both at law and in equity, whether by judicial interpretation, or by force of rule that a party who has an opportunity so to do must plead specially an estoppel (19 American Jurisprudence 382).

In Gilmer vs. Poindexter, 10 Howard 257; 13 L. Ed. 411, it was said:

> "An estoppel, it is said, should be certain to every intent, and therefore, if a thing be not directly and precisely alleged, it shall not be estopped."

So also in Philadelphia, Wilmington R. R. vs. Howard, 13 Howard, 307, 14 L. Ed. 157:

> "If a party has an opportunity to plead an estoppel and voluntarily omits to do so, and tenders or takes issue on the fact, he thus waives the estoppel, and commits the matter to the jury, who are to find the truth."

In Capital Lumber Company vs. Barth, 33 Mont. 94, 81 Pac. 994, it is said:

> "It is the general rule that matter of estoppel, to be effective, must be alleged. Where, however, there has been no opportunity to allege it, it may be given in evidence with the same conclusive effect as if alleged. In Isaacs v. Clark, 12 Vt. 692, 36 Am. Dec. 372, it is said: 'It is no doubt true that where the party has an opportunity to plead the estoppel he is bound to do it, and if he omits it the jury will not be bound by the estoppel, but may find according to the fact. If, however, there has been no opportunity to plead the matter as an estoppel, it may, in general, be given in evidence, and it will have the same conclusive effect as in cases where it is pleaded."

Also in Eisenhauer vs. Quinn, 36 Mont. 368, 93 Pac. 38:

> " ' "It is no doubt true that where the party has an opportunity to plead the estoppel he is bound to do it, and if he omits it, the jury will not be bound by the estoppel, but may find according to the facts. If, however, there has been no opportunity to plead the matter of an estoppel, it may, in general, be given in evidence, and it will have the same conclusive effect as in cases where it is pleaded. This is according to the current of the authorities, though they may not have been entirely uniform".' However effective an estoppel might have been, if pleaded and proved, it is not available to Eisenhauer in this instance, since he did not plead it."

The foregoing rule is consistently adhered to in the Montana decisions:

Conrow vs. Huffine, 48 Mont. 437, 138 Pac. 1094

Colwell vs. Grandin, 64 Mont. 518 210 Pac. 765

Shipler vs. Potomac Copper Co., 69 Mont. 86, 220 Pac. 1097

Scott vs. Prescott, 69 Mont. 540, 223 Pac. 490

Pue vs. Lewis & Clark County, 75 Mont. 207, 243 Pac. 573

Scott vs. Jardine Gold Co., 79 Mont. 485, 257 Pac. 406

Willard vs. Campbell, 91 Mont. 493, 11 Pac. (2d) 782

Middle States Oil vs. Tamer Jones Co., 73 Mont. 180, 235 Pac. 770

Plaintiff can not fall back on the rule that no estoppel need be pleaded unless there is an opportunity to plead it. Plaintiff pleaded the highway construction contract (R 4-28) and the liability policy (R 5-29). The policy contained the exclusions and because plaintiff failed to plead them in haec verba, defendant, after motions to dismiss, pleaded the exclusions affirmatively. Plaintiff might have replied, or moved for judgment on the pleadings based on estoppel, or might have made proof to justify the trial court in holding in favor of plaintiff because of estoppel. None of these things was done and the whole question of estoppel was entirely omitted from the pleadings, proof or findings in these cases until the Circuit Court of Appeals included it in its decision. Thus the defendant was precluded from making any defense on the question.

It cannot be said that defendant waived its defense against estoppel for the charge was never made against it. Neither can it be said that there was no sound defense. Defendant could have proven that it furnished a standard form policy, which becomes material in the light of the decision of the Circuit Court of Appeals when it says:

"There is not even a showing that the policy appelant wrote in this instance was a standard form in general use . . . . "

Defendant could have shown both in fact and in law that it made no representation to Roberta or Marguerite Doheny; that they did not rely and could not have relied upon any representation or conduct of defendant, and that they could not have suffered any detriment or disadvantage by reason of anything said or done by defendant either to them or to the Highway Commission, or to Coverdale & Johnson.

There are no statutes in Montana, or rules of the Highway Commission requiring the furnishing of public liability insurance, upon which members of the public could rely as a representation as to the form of the insurance and since the Highway Commission prescribed no form (testimony of Secretary Whipps (R115)) there could not possibly have been any representation either to the public or the Highway Commission.

The United States Supreme Court has taken jurisdiction in a few cases in the matter of interpretation of the Rules of Civil Procedure:

Sibbach vs. Wilson & Company, 85 L. Ed. 479, 312 U. S. 1

The cases are more numerous in the Circuit Court of Appeals although none has been found directly on the question of estoppel under Rule 8(c):

Bridges vs. Dahl (6th C. C. A.) 108 Fed (2d) 228

Carpenter vs. B. & O. R. R. (6th C. C. A.) 109 Fed (2d) 374

However, in Nakdimen vs. Baker (8th Circuit) 111 Fed. (2d) 778, it is held that a waiver must be pleaded under the rule and likewise that no estoppel existed.

Nakdiemen vs. Baker, 111 Sed. (2d) 782.

It is therefore urged at this point that this Court ought to take jurisdiction because it is of particular importance during the present formative stage of practice under the New Rules of Civil Procedure that an important question of interpretation be finally decided by the court of last resort.

III.

The significance of this decision of the Circuit Court of Appeals is not entirely clear at first impression so the attention of the Supreme Court is now directed at the whole question of the effect and probable consequence if the decision should become the law. For the information of the Supreme Court and to demonstrate the significance of the entire matter an examination has been made of a number of standard contract specifications in general use by the United States Government and other public contracting agencies and it is found that the following standard specifications are generally included in or attached to construction contracts:

1. From contract of November 17, 1941, for construction of an aluminum plant at Spokane, Washington, the owner being the *Aluminum Company of America* acting for and on behalf of *Defense Plant Corporation*, a corporation created by *Reconstruction Finance Corporation* pursuant to Section 5d of the *Reconstruction Finance Corporation Act*, as amended, to aid the *Government of the United States* in the National Defense Program:

"CONTRACTOR shall, during the progress of the work, maintain (a) WORKMEN'S COMPENSATION INSURANCE for all of its employees employed at the site of the work, or if such insurance is not required by the laws of the state wherein the work is to be performed, EMPLOYER'S LIABILITY INSURANCE; (b) CONTRACTOR'S PUBLIC LIABILITY INSURANCE; and (c) AUTOMOBILE LIABILITY INSURANCE.

"The limits of liability provided in each such liability insurance policy shall not be less than $20,000 for injuries, including accidental death, to any person, and, subject to the same limit for each person, not less than $40,000 for any one accident involving two or more persons. AUTOMOBILE LIABILITY INSURANCE shall also provide a property damage limit of not less than $5,000 covering all owned and rented equipment which is used in or on the work.

"Should all or any part of the contract be sublet, CONTRACTOR shall, in addition to the foregoing types of insurance, maintain CONTRACTOR'S PROTECTIVE LIABILITY INSURANCE in an amount not less than $20,000 for injuries, including accidental death, to any one person, and, subject to the same limit for each person, not less than $40,000 for any one accident involving two or more persons; except that CONTRACTOR'S PROTECTIVE LIABILITY INSURANCE need not be maintained to the extent that in any cost-plus contract between CONTRACTOR and a subcontractor, the subcontractor maintains WORKMEN'S COMPENSATION or EMPLOYER'S LIABILITY INSURANCE and CONTRACTOR'S PUBLIC LIABILITY INSURANCE and AUTOMOBILE LIABILITY INSURANCE, as above set forth, and provided CONTRACTOR is named as an additional insured in such policies of insurance.

"Certificate of all such insurance, together with certificates from the insurance companies that they will not cancel the insurance until they have given Agent at least ten (10) days' prior written notice thereof, shall be filed with Agent prior to the commencement of work hereunder."

2. United States Bureau of Public Roads: Federal Works Agency of the Public Roads Administration. State of Montana, Project SN 8-N1, O, Clark Fork River Bridge:

"In addition to any other forms of insurance or bonds required under the terms of the contract and specifications, the contractor will be required to carry insurance of the following kinds and amounts:

"1. Contractors' Public Liability and Property Damage Liability Insurance.

"The contractor shall furnish evidence to the United States Public Roads Administration that, with respect to the operations he performs, he carries regular Contractors' Public Liability Insurance providing for a limit of not less than Fifteen Thousand Dollars ($15,000) for all damages arising out of bodily injuries to or death of one person, and subject to that limit for each person, a total limit of Fifty Thousand Dollars ($50,000) for all damages arising out of bodily injuries to or death of two or more persons in any one accident, and regular Contractors' Property Damage Liability Insurance providing for a limit of not less than Fifteen Thousand Dollars ($15,000) for all damages arising out of injury to or destruction of property in any one accident and, subject to that limit per accident, a total (or aggregate) limit of Fifty Thousand Dollars ($50,000) for all damages arising out of injury to or destruction of property during the policy period.

"If any part of the work is sublet similar insur-

ance shall be provided by or in behalf of the subcontractors to cover their operations.

"2. Contractors' Protective Public Liability and Property Damage Liability Insurance.

"The contractor shall furnish evidence to the United States Public Roads Administration that, with respect to the operations performed for him by subcontractors, he carries in his own behalf regular Contractors' Protective Public Liability Insurance providing for a limit of not less than Fifteen Thousand Dollars ($15,000) for all damages arising out of bodily injuries to or death of one person, and subject to that limit for each person, a total of Fifty Thousand Dollars ($50,000) for all damages arising out of bodily injuries to or death of two or more persons in any one accident, and regular Contractors' Protective Property Damage Liability Insurance providing for a limit of not less than Fifteen Thousand Dollars ($15,000) for all damages arising out of injury to or destruction of property in any one accident and, subject to that limit per accident, a total (or aggregate) limit of Fifty Thousand Dollars ($50,000) for all damages arising out of injury to or destruction of property during the policy period.

"3. Railroads' Protective Public Liability and Property Damage Liability Insurance.

"In addition to the above, he shall furnish evidence to the United States Public Roads Administration that, with respect to the operations he or any of his subcontractors perform, he has provided for and in behalf of the Northern Pacific Railway Company regular Protective Public Liability insurance providing for a limit of not less than Fifteen Thousand Dollars ($15,000) for all damages arising out of bodily injuries to or death of one person, and, subject to that limit for each person, a total limit of Fifty Thousand Dollars ($50,000) for all damages

arising out of bodily injuries to or death of two or more persons in any one accident, and regular Protective Property Liability insurance providing for a limit of not less than Fifteen Thousand Dollars ($15,000) for all damages arising out of injury to or destruction of property in any one accident and, subject to that limit per accident, a total (or aggregate) limit of Fifty Thousand Dollars ($50,000) for all damages arising out of injury to or destruction of property during the policy period."

3. United States Indian Irrigation Service. Crow Irrigation Project on Crow Reservation, Montana, R. P. England, Contractor:

"30. *Compensation Insurance.* The contractor shall provide adequate workmen's compensation insurance for all labor employed on the project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the contracting officers shall be given."

4. United States Public Works Administration. Regional Manual of Instructions, revised September 15, 1938, at Omaha, Nebraska:

"2. *Contractor's Insurance.* The Contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the Contractor allow any Subcontractor to commence work on his subcontract until all similar insurance required of the Subcontractor has been so obtained and approved."

"(b) *Public Liability and Property Damage Insurance.* The Contractor shall take out and maintain during the life of this contract such Public Lia-

bility and Property Damage Insurance as shall protect him and any Subcontractor performing work covered by this contract, from claims for damages for personal injury, including accidental death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any Subcontractor or by anyone directly or indirectly employed by either of them and the amounts of such insurance shall be as follows:

"Public Liability Insurance in an amount not less than $..... for injuries, including accidental death to any one person, and subject to the same limit for each person, in an amount not less than $....., on account of one accident, and Property Damage Insurance in an amount not less than $.....

"The Contractor shall require Subcontractors, if any, not protected under the Contractor's insurance policies to take out and maintain insurance of such nature in the following amounts:

	Public Liability Insurance	Property Damage Insurance
On Subcontracts less than $1,000	.....	.....
On Subcontracts $1,000 - $5,000	.....	.....
On Subcontracts $5,000 - $20,000	.....	.....
On Subcontracts $20,000 - $50,000	.....	.....
On Subcontracts $50,000 and over	.....	.....

"(c) *Insurance Covering Special Hazards.*

The following special hazards shall be covered by rider or riders to the Public Liability and/or Property Damage Insurance policy or policies herein elsewhere required to be furnished by this Contrac-

tor or by separate policies of insurance, in amounts as follows:

"3. *Proof of Carriage of Insurance.* The Contractor shall furnish the Owner with satisfactory proof of carriage of the insurance required."

5. Helena (Montana) High School, Public Works Administration Project Number 2603, April 1934:

"VII-50—CONTRACTOR'S LIABILITY INSURANCE:

"The contractor shall maintain such insurance as will protect him from claims under workmen's compensation acts and from any other claims for damages for personal injury, including death, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. Certificates of such insurance shall be filed with the owner, if he so require, and shall be subject to his approval for adequacy of protection."

6. Montana State Water Conservation Board. Public Works Administration Docket No. 1167-F, Montana (still under construction:

"(b) *Public Liability and Property Damage Insurance.* Each contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including accidental death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or by any one directly or indirectly employed by either of them and the amounts of such insurance shall be as follows:

"Public Liability Insurance in an amount not less than $10,000 for injuries, including accidental death, to any one person, and, subject to the same limit for each person, in an amount not less than $20,000 on account of one accident, and Property Damage Insurance in amounts not less than $5,000.

"The contractor shall require subcontractors, if any, not protected under the contractor's insurance policies to take out and maintain insurance of such nature in the following amounts:

	Public Liability Insurance	Property Damage Insurance
On subcontracts less than 1,000	$10,000/$20,000	$1,000
On subcontracts $1,000 - $5,000	$10,000/$20,000	$1,000
On subcontracts $5,000 - $20,000	$10,000/$20,000	$1,000
On subcontracts $20,000-$50,000	$10,000/$20,000	$1,000
On subcontracts $50,000-and over	$10,000/$20,000	$5,000

7. Greybull Valley Irrigation District Park and Bighorn Counties, Wyoming, Sunshine Reservoir Dam.

"The Contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the Contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved."

"b. *Public Liability and Property Damage Insurance.* The Contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered

by this contract, from claims for damages for personal injury, including accidental death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or by anyone directly or indirectly employed by either of them and the amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $50,000 for injuries, including accidental death, to any one person, and subject to the same limit for each person, in an amount not less than $100,000 on account of one accident, and Property Damage Insurance in an amount not less than $5,000.

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such sub-contractor."

8. *Specifications for construction of Roads and Bridges in national forests and national parks, 1941, Federal Works Agency—Public Roads Administration Article 7.1:*

"Workmen's Compensation Insurance: The contractor shall obtain workmen's compensation insurance in accordance with the requirements of the laws of the State in which the work is to be performed in case the constituted authority of such State shall apply such laws to this project. In the event such laws do not apply to the project, the contractor shall provide workmen's compensation insurance equal at least to that required by the laws of the State for other work. In those States where there are no workmen's compensation laws the contractor shall

provide, workmen's compensation insurance at least equal to that ordinarily carried for work of this kind performed for the United States Government in that section of the country, which insurance shall be subject to the approval of the engineer, and shall provide for payments to workmen in case of temporary or permanent disability resulting from the work provided for herein and for payments to their dependents in case of death."

From the foregoing it is apparent that many, if not all, of the contracting agencies of the United States, and also many of the public contracting agencies in Montana as well as other states, such as irrigation districts, school boards, highway commissions and numerous others, require contractors on public works to carry liability insurance. The contract requirements appear to be more or less uniform and in most cases the contractor must notify the contracting agency that such insurance is being carried. All of such contracts require a performance bond. So, if under these circumstances, the provisions of the public liability policy are to be disregarded, and if the provisions of the contract specifications are to become the basis of the liability to the general public, whether by reason of estoppel, or upon the general proposition that the general contract specifications must be construed so as to make the limitations in the liability policy inapplicable, there must be, throughout the United States, almost innumerable public liability policies issued and outstanding under a unanimous misunderstanding of the law. *It seems impossible to place too much emphasis on the fact that by this decision every member of the general public acquires privity and thus becomes entitled to*

the benefit of an indemnity to which he was a total stranger.

Furthermore, while the instant cases were founded upon negligence, the contract specification provisions in practically all cases, including the instant cases, are so broad as to amount to a requirement of general indemnity to the general public irrespective of negligence:

> "The contractor shall carry public liability insurance to indemnity the public for injuries or damages sustained by reason of the carrying on the work." (R 86).

It is most respectfully submitted that to secure uniformity of decision, and in the public interest this question is of such importance that it ought to be decided by the court of last resort as was done in:

Del Vecchio vs. Bowers, 296 U. S. 280, 80 L. Ed. 229.

ARGUMENT.

1. As heretofore pointed out estoppel should have been pleaded and proven if to be relied upon under the Rules of Civil Procedure.

2. However, even if the pleading is held sufficient no estoppel in fact existed.

The elements of estoppel are: (1) Conduct which amounts to a false representation, or the concealment of a material fact, inconsistent with the fact which the party subsequently attempts to assert; (2) intention or expectation that such representation will be acted upon by the other party; (3) actual or constructive knowledge of the real facts; (4) lack of knowledge or the means of knowl-

edge in the other party, who; (5) relies up the representation; (6) to his detriment or disadvantage.

19 American Jurisprudence page 643.

The leading case on the subject, decided by the United States Supreme Court is Dickerson vs. Colgrove, 100 U. S. 578, approved in:

Kirk vs. Hamilton, 102 U. S. 79

Drexel vs. Berney, 122 U. S. 240 30 L. Ed. 1219

Wehrman vs. Conklin, 155 U. S. 314 39 L. Ed. 167

Illinois Surety vs. John Davis Co. 244 U. S. 376 61 L. Ed. 1206

Sanders vs. Browne (Court of Patent Appeals) 117 Fed. (2) 547 at page 559.

United States vs. Georgia Marble Co. (Fifth Circuit) 106 Fed. (2) 955.

The cases are practically all in harmony in defining estoppel as above. In Montana the law is the same:

"Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such a belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it." (Revised Codes Montana, 1935).

Waddell vs. School District No. 2, Yellowstone County, 74 Mont. 91, 238 Pac. 884.

Lindblom vs. Employers Liability Assurance Co. 88 Mont. 488, 295 Pac. 1007.

Scott vs. Jardine Gold Mining & Milling Co., 79 Mont 485, 257 Pac. 406.

Mitchell vs. Banking Corporation of Montana, 95 Mont. 23, 24 Pac. (2d) 124.

In re McGovern's Estate, 77 Mont. 182, 250 Pac. 812.

Peterson vs. School District No. 1, Cascade County, 73 Mont. 442, 236 Pac. 670.

Moore vs. Sherman, 52 Mont. 542, 159 Pac. 966.

Estoppel operates only on the parties and their privies.

Van Renesselear vs. Kearney, 11 Howard 297, 13 L. Ed. 703.

State ex rel Finley vs. District Court, 43 Pac. (2d) 682, 99 Mont. 200.

Braithwaite vs. Harvey, 36 Pac. 38, 14 Mont. 208.

Assuming that the defendant in these actions, by writing the Highway Commission that it had written the public liability policy, might be estopped from later denying that fact in an action against it by the Highway Commission, certainly no representation was made to the general public and obviously no person would submit to an automobile accident in reliance upon the existence of a liability policy, especially when knowledge of the existence of the policy could not possibly have been communicated to him, and this is particularly true in the light of the testimony of Mr. Whipps, Secretary and Administrative Engineer of the Highway Commission who testified (R 115) that the Commission had never prescribed the form of the policies in such cases and had never called for submission of such policies to it.

DECISION OF CIRCUIT COURT OF APPEALS

It cannot be maintained that the Circuit Court of Appeals affirmed the trial court on any theory except estoppel. The opinion does not cite one single authority. It does refer to two sections of the Montana Code neither of which justifies the decision. Section 10521 Revised

Codes of Montana, 1935, is the general statute providing that in construing an instrument the court may resort to extraneous circumstances, such as the situation of the parties and the subject matter but it does not serve as a means of modifying an unambiguous contract so as to delete distinct and important parts thereof especially for the benefit of one who was never a party to it.

Likewise Section 7528 Revised Codes of Montana, 1935, cited by the Circuit Court of Appeals is applicable only in the case of ambiguity. If any section of the Montana code is applicable it is Section 7529 which provides that if the language of a contract is clear and explicit and does not involve an absurdity, the interpretation must be as expressed in the contract.

Circuit Judge Haney in the concurring opinion agrees in part with the views expressed in this brief. He concluded that there could be no estoppel, except possibly in an action by the State of Montana. He thought that the judgment should be affirmed on the ground that recovery should be had on the performance bond, but this could not be accomplished by reason of the decision in:

> *The case of National Surety Company of New York vs. Ulmen; 68 Fed. (2) 330: Certiorari Denied, 78 L. Ed. 1479.*

Surprisingly the Ulmen case was not referred to in the decision of the Circuit Court of Appeals. Nevertheless it is in point and contrary to the decision in these cases.

Ulmen was injured when the automobile in which he was riding went through a barricade on a highway construction job in Montana. He sued the contractor and

recovered but was unable to collect his judgment. There upon he sued National Surety Company which had written the performance bond.

The contract between the contractor and the State of Montana had a specification requiring the contractor to

> "provide, erect and maintain all necessary barricades, suitable and sufficient red lights, warning and danger signals and signs, provide a sufficient number of watchmen and take all necessary precautions for the protection of the work and the safety of the public."

Ulmen contended that since the performance bond provided that:

> "the contractor shall in all respects comply with the contract, and his . . . obligations thereunder including the specifications therein referred to . . . and shall save harmless the State of Montana . . . from any damages growing out of the carelessness of said contractor . . . . "

the Surety Company was liable to him on its bond.

The Circuit Court of Appeals refused to enlarge the provisions of the bond and held that since the performance bond contained no provision for *payment* for damages in tort actions, but only payment for labor and materials, no recovery could be had on the bond by Ulmen.

So in the case at bar, the public liability policy, while containing a general provision for payment, specifically excludes automobiles elsewhere than at the immediate site of the work and there is no more justification for broadening that provision in the policy than there was for reading the word "payment" into the performance bond in the Ulmen case.

The two decisions cannot be reconciled. The general provisions in these public contracts should not be construed, either by estoppel or otherwise, to extend the rights of the general public beyond the limits of either the performance bond or the liability policy.

The entire structure of these public contract documents is here involved throughout the United States.

CONCLUSION

It is most respectfully submitted:

1. That this Court ought to take jurisdiction of this case and that a decision should be rendered on the merits to the end that Rules 8(c) and 12(h) of the Rules of Civil Procedure for the United States District Courts may be finally interpreted and so that the very important question as to the meaning of the contract specifications and public liability insurance policies and performance bonds of the character here involved may be settled.

Respectfully submitted.

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